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No. 76-404

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1976

ILLINOIS BRICK COMPANY, AMERICAN BRICK CO., AMPRESS BRICK CO., INC., ANJO, INC., CHICAGO BLOCK CO., INC., E. L. RAMM COMPANY, HEIGHTS BLOCK, INC., JOLIET CONCRETE PRODUCTS, INC. and NORTHFIELD BLOCK CO.,

Petitioners,

vs.

STATE OF ILLINOIS, et al.,

Respondents.

PETITIONERS' REPLY BRIEF IN SUPPORT OF THE GRANT OF A WRIT OF CERTIORARI

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Statement of Additional Facts

Following the federal government's filing of civil and criminal actions against petitioners, numerous civil treble-damage actions were filed, all alleging the same conspiracy and all seeking to recover the same alleged overcharge. When settlement of the civil class actions was proposed, the State of Illinois (hereinafter the "State") objected to the settlements even though it was not included in any settling class and thus would not be bound by any order approving the settlement.

The State has quoted the first two paragraphs of a letter wherein petitioners assured the District Court that settlement of other cases would not dispose of the State's case; that is, any dismissal order would not release the State's purported claim. (State's Br. p. 2). The next paragraph of that letter, not quoted by the State, informed the Court that petitioners would persist in their position taken here, *i.e.*, that the State has no claim under the antitrust laws. (State's Appendix at p. 2a).

Significantly, neither the District Court nor the Court of Appeals has regarded the letter as vitiating in any respect the position taken in petitioners' motion for summary judgment.

ARGUMENT

I.

THE STATE HAS ERRONEOUSLY CHARACTERIZED THE PASS-ON PROBLEM AS AN ISSUE OF STANDING TO SUE.

The decisions in both *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), and the Third Circuit *plumbing fixture cases** were based upon the insuperable evidentiary problems involved in proving a pass-on. Subsequent decisions which have refused to apply *Hanover* or the *plumbing fixture cases* to bar indirect purchaser claims, generally have merely bypassed the pass-on evidentiary problem by treating it as one of standing. See Handler & Blechman, *Antitrust and the Consumer Interest: The Fallacy of Parens Patriae and a Suggested New Approach*, 85 Yale L.J. 626, 644-6 (1976). The State's characterization of this case as involving only a question of standing similarly seeks to evade and postpone final resolution of the evidentiary problems in proving pass-on.

After characterizing the pass-on issue as merely one of standing, the State then argues that the standing question has been resolved by this Court's opinion in *Hawaii* v. *Standard Oil Co. of Calif.*, 405 U.S. 251, 266 (1972). On

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* *Mangano* v. *American Radiator & Standard Sanitary Corp.*, 438 F.2d 1187 (3d Cir. 1971), *affirming Philadelphia Housing Authority* v. *American Radiator & Standard Sanitary Corp.*, 50 F.R.D. 13 (E.D. Pa. 1970); *Philadelphia Housing Authority* v. *American Radiator & Standard Sanitary Corp.*, 323 F. Supp. 381 (E.D. Pa. 1970).

the contrary, the passage quoted at pages 5 and 6 of the State's brief simply recognizes that a state is not automatically foreclosed from serving as the representative of a class of private consumers.*

Indeed, *Hawaii* expressly reaffirmed the holding of *Hanover Shoe* and based its rejection of a *parens patriae* claim in part upon the language used in *Hanover* to reject the pass-on defense. In *Hawaii*, this Court stated (405 U.S. at 263, n. 14):

> ". . . damages are established by the amount of the overcharge. Under §4, courts will not go beyond the fact of this injury to determine whether the victim of the overcharge has partially recouped its loss in some other way, even though a State, for example, may ultimately recoup some part of the overcharge through increased taxes paid by the seller. See *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 489 (1968). Measurement of an injury to the general economy, on the other hand, necessarily involves an examination of the impact of a restraint of trade upon every variable that affects the State's economic health—*a task extremely difficult, 'in the real economic world rather than an economist's hypothetical model.' Id.*, at 493." (Emphasis added.)

By thrusting the federal courts back into the complex economic pass-on questions, the Seventh Circuit is in conflict with the policy underlying *Hawaii* as well as in direct conflict with *Hanover Shoe*.

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* The State's reliance on *State of Illinois* v. *Bristol Myers Co.*, 470 F.2d 1276, 1278 n.4 (D.C. Cir. 1972) is similarly misleading. The D. C. Circuit Court did not address the pass-on issue; rather, it simply noted this Court's suggestion that a state might serve as a class representative under some circumstances.

II.

THERE IS A CONFLICT AMONG THE CIRCUITS: THE STATE'S ATTEMPT TO MINIMIZE THIS CONFLICT IS UNPERSUASIVE.

The State is in error when it denies that a conflict exists between the Seventh Circuit's decision here and that of the United States Court of Appeals for the Third Circuit in *Mangano* v. *American Radiator and Standard Sanitary Corp.*, 438 F.2d 1187 (3d Cir. 1971). Contrary to the State's argument, the *Mangano* decision was not limited to the appellants' failure to answer interrogatories. Rather, the Third Circuit met the pass-on issue squarely. The Court stated (438 F.2d at 1188):

> "Present consideration of the alternative ground of decision may facilitate the conclusion of this litigation. *Therefore, we have considered and affirm the district court's decision as based upon substantive law involved in the homeowners', commercial building owners', and apartment building owners' cases.* More particularly, absent a showing by the plaintiffs that their purchases were made 'pursuant to a preexisting cost-plus contract or analogous fixed markup type of arrangement,' . . . *it is appropriate in light of Hanover Shoe, Inc.* v. *United Shoe Machinery Corp. . . . to dismiss these three cases.*" (Footnote and citations omitted; emphasis added.)

After dismissing *Mangano* as "outmoded," the State erroneously asserts that there has been a consistent line of recent appellate decisions supporting the Seventh Circuit. (State's Br. fn at p. 8). Two of the State's "recent decisions" pre-date this Court's resolution of the pass-on issue in *Hanover Shoe*. Another simply refused to hear a certified appeal. See *Lehigh Portland Cement Co.* v. *City of North Bay Village* (Misc. No. 2364, 5th Cir. 1972), denying appeal in *Southern General Builders, Inc.* v.

Maule Industries, Inc., 1973-1 TRADE CASES ¶74,484 (S.D. Fla. 1972). *In re Master Key Antitrust Litigation*, 528 F.2d 5, 12 n. 11 (2d Cir. 1975), notes the conflict between the Third and Ninth Circuits and then expressly declines to decide the issue. *Malamud* v. *Sinclair Oil Corp.*, 521 F.2d 1142 (6th Cir. 1975), articulated a standing test but did not address the pass-on issue.

III.

THE PASS-ON QUESTION WAS PROPERLY RESOLVED ON MOTION FOR SUMMARY JUDGMENT.

This case was decided by the District Court on a Motion for Summary Judgment, not on a Motion to Dismiss. Before the District Court ruled, the State advised the District Court that petitioners' motion was "now *sub judice* and ripe for decision."* In support of the motion, petitioners had adduced admissions from the State and the other governmental entities that concrete block had not been purchased from defendants either directly or indirectly. Rather, the record showed that the State and the other governmental entities purchased buildings, of which concrete block was one component part, from unrelated third parties pursuant to competitive bidding. (App. 11).

The State contends that the complaint alleges and the evidence will show that the alleged price fixing of concrete block had a direct and substantial impact on government purchases of buildings.

> "The bidders plugged these known material costs into their bid as separate line items. This procedure resulted in a direct flow through of the overcharge resulting from the price fix plans incidental additional damages as a result of the contractor's habit of adding a fixed percentage markup on material."
> (State's Br. p. 8-9)

* See Paragraph III.C. of "Summary of Concrete Block Antitrust Cases Prepared for Honorable Alfred Y. Kirkland" by the State's counsel attached as an appendix to this brief.

The State's argument should be rejected. The State had the opportunity but failed to offer any affidavits or deposition testimony regarding separate line items, contractor's habits, or any other facts contradicting or explaining the position taken by petitioners. In short, as the State admitted to the District Court, the summary judgment motion was ripe for decision.

Even assuming, however, that the State's assertions raise factual questions, *Hanover Shoe* precludes the State from attempting to prove its assertions. In *Hanover Shoe*, the defendant maintained that there could be no injury

> "where the overcharge is imposed equally on all of a buyer's competitors and where the demand for the buyer's product is so inelastic that the buyer and his competitors could all increase their prices by the amount of the cost increase without suffering a consequent decline in sales." 397 U.S. at 492.

It was in response to this claim that this Court made its statements about the "insuperable difficulty" of recreating pricing decisions "in the real economic world rather than an economist's hypothetical model." 392 U.S. at 493.

Conclusion

The State's Brief does not diminish the need for a definitive decision by this Court. There is an inherent conflict between the Court of Appeals' decision below and this Court's opinion in *Hanover Shoe*. Recognition of this inherent conflict has led to conflicting decisions and considerable confusion in the lower federal courts. Petition-

ers believe that this case presents an appropriate vehicle for resolution of the lingering pass-on problem.

For the foregoing reasons, it is respectfully submitted that this Court should grant the Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

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III. *Motions Pending for Decision in State of Illinois Action*

A. *Defendants' Rule 37 Motion to Dismiss Governmental Entities who Failed to Answer Interrogatories*

Defendants' motion was filed on November 6, 1974. Plaintiffs' response was filed on January 10, 1975, and defendants' reply brief was filed on January 20, 1975. Unless the Court desires oral argument, the motion is ripe for disposition.

B. *Defendants' Rule 21 Motion to Drop All Governmental Plaintiffs Except the State of Illinois*

Defendants' motion was filed on December 20, 1974. Plaintiffs' response was filed on January 20, 1975, and defendants' reply brief was filed on February 5, 1975. Unless the Court desires oral argument, this motion is also ripe for decision.

C. *Defendants' Motion for Partial Summary Judgment*

Defendants' motion was filed on January 6, 1975. Plaintiffs' memorandum in opposition to defendants' motion was filed on February 4, 1975. Defendants' reply brief was filed on February 28, 1975. Unless the Court desires oral argument, this motion is now *sub judice* and ripe for decision.

Respectfully submitted, for
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